

# Michigan Law Review

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Volume 61 | Issue 7

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1963

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### Recommended Citation

R. W. Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245 (1963).  
Available at: <https://repository.law.umich.edu/mlr/vol61/iss7/3>

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## REFLECTIONS ON THE NATURE OF LABOR ARBITRATION

R. W. Fleming\*

THE use of arbitration as a means of settling labor-management disputes has increased steadily in the past twenty years.<sup>1</sup> Recent decisions of the Supreme Court have underlined the importance of the process.<sup>2</sup> The natural tendency is to compare labor arbitration with the court system as an adjudicatory process. There are, however, significant differences between the two, and this needs to be better understood. Five important differences, which bear further examination, suggest themselves almost immediately.

1. The arbitrator is a "private" judge who administers a "private" system of jurisprudence over which labor and management hold joint sovereignty. His oath, insofar as he ever takes one, requires only "that he will faithfully and fairly hear and examine the matters in controversy . . . and make a just award according to the best of his understanding."<sup>3</sup> By contrast, the federal judge swears to "administer justice without respect to persons [and] . . . faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."<sup>4</sup>

2. The arbitrator, unlike the judge, is chosen by the parties who bring the dispute to him. In the absence of agreement by the parties the arbitrator is without jurisdiction.

3. Even under the so-called "permanent" umpireships the arbitrator is without effective tenure, and the parties are as free to reject his services in the future as they were to nominate him in the first instance.

4. The arbitration tribunal frequently includes partisan members who make no pretense of impartiality and who can, at least in theory, out-vote the neutral member or members.

5. A greater premium is placed on the acceptability of an

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<sup>1</sup> SLIGHTER, HEALY & LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 739 (1960).

<sup>2</sup> *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

<sup>3</sup> *Code of Ethics for Arbitrators*, in NATIONAL ACADEMY OF ARBITRATORS, *THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS 1948-1954*, at 153, 157 (McKelvey ed. 1957).

<sup>4</sup> 28 U.S.C. § 453 (1958). (Emphasis added.)

arbitrator's award by the parties in a dispute than would normally be the case with a court decision.

An intelligent evaluation of the differences, and of the labor arbitration tribunal in general, can be made only after an exploration of its origin and history, and after some consideration of the kinds of cases which are submitted for decision.

## I. ORIGIN AND DEVELOPMENT OF LABOR ARBITRATION

The tremendous growth of grievance arbitration is a phenomenon of the post-World War II period. This is not surprising. Grievance arbitration presupposes the existence of collective bargaining agreements. Collective bargaining agreements, in turn, presuppose union organization. The great growth in the labor movement, especially in the mass production industries, occurred in the years following passage of the Wagner Act in 1935.<sup>5</sup> That law was widely disregarded until it was held to be constitutional in 1937.<sup>6</sup> Thereafter, unions were primarily concerned with organizational problems until the advent of World War II in 1939, and our own entry into the war in 1941. Because of the war, labor disputes could not be tolerated and were therefore made subject to the jurisdiction of the War Labor Board. That body, engaged as it was in settlement of controversies over the terms of new agreements, could hardly permit itself to become embroiled in day-to-day grievances. For that reason the Board, in July 1943, issued a policy statement indicating that a contractual grievance procedure should provide for the "final and binding settlement of all grievances not otherwise resolved. For this purpose provisions should be made for the settlement of grievances by an arbitrator, impartial chairman or umpire . . . ." During the balance of the war years grievance arbitration clauses were included in thousands of agreements, either by direct order of the War Labor Board or because of its indirect influence.

Although grievance arbitration clauses were included in a great many contracts during the war period by government fiat, labor and management grew to accept the practice. When President Truman convened his Labor-Management Conference in the fall of 1945, a tripartite subcommittee was able to reach unanimous agreement that contracts should provide "by mutual agree-

<sup>5</sup> Derber, *Growth and Expansion*, in *LABOR AND THE NEW DEAL* 1 (Derber & Young ed. 1957).

<sup>6</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>7</sup> 1 NATIONAL WAR LABOR BOARD TERMINATION REPORT 66 (1943).

ment for the final determination of any unsettled grievances or disputes involving the interpretation or application of the agreement by an impartial chairman, umpire, arbitrator, or board.”<sup>8</sup>

The accident of timing which brought a major war just at the moment when collective bargaining agreements were greatly increasing largely explains the vast expansion in grievance arbitration. But it does little to explain the nature of the arbitration tribunal, with which we are primarily concerned. One must look to an earlier period of history to gain insight as to that question.

In his *Historical Survey of Labor Arbitration*, Professor Edwin E. Witte pointed out that it is difficult to trace the beginnings of labor arbitration in the United States because the term has been used to connote quite different things.<sup>9</sup> In its earliest stage it meant what we would now call “collective bargaining,” and at subsequent stages it often meant what we would now call either “mediation” or “conciliation.” Moreover, up to and including World War I the emphasis was not, as it is now, on arbitration as a final step in the grievance procedure, but rather as a device for resolving “interest” disputes over the terms of new contracts. Perhaps because the emphasis in arbitration during this period tended to be on “interest” disputes, rather than those involving contractual “rights,” President Wilson was unable to get agreement on the arbitration principle when he convened a National Industrial Conference in 1919.<sup>10</sup>

After World War I, some observers thought that they detected a developing “industrial law” growing out of arbitration experiences like those in the clothing industry. On this point Professor Witte observed:

“The process of arbitration was looked upon not merely as an expedient for the settlement of labor disputes but as involving the substitution of the rule of law in industrial relations for the prior settlement of disputes through the ordeal of combat. . . . Before the end of the twenties, however, arbitration in this industry had become much less formal. *The arbitrators generally looked upon what they were doing as the finding of workable solutions for specific disagreements rather than of promulgating principles to be observed in the future relations of the parties.*”<sup>11</sup>

<sup>8</sup> SLICHTER, HEALY & LIVERNASH, *op. cit.* *supra* note 1, at 747.

<sup>9</sup> WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* 3 (1952).

<sup>10</sup> *Id.* at 32.

<sup>11</sup> *Id.* at 37-38. (Emphasis added.)

From the end of World War I to the coming of the New Deal there appears to have been a modest, but unspectacular, growth in grievance arbitration. A significant breakthrough, prior to World War II, came in 1937 when General Motors, having just recognized the UAW on a members-only basis, agreed to a contract which contained a provision stating that the parties might, by mutual consent, refer any unresolved grievance to an impartial umpire.<sup>12</sup> This clause was apparently used only twice, but the 1940 agreement between the parties established the umpire system which still obtains.<sup>13</sup> In the interim period both the union and the company reached the independent conclusion that work interruptions arising out of grievances were undesirable and to be avoided through some kind of third-party procedure.<sup>14</sup> Significantly, the company thought of this as an adjudicative procedure, as the following extract from a management policy statement indicates:

"Management is charged with the responsibility for promoting and maintaining the best long-term interests of the business as a continuing institution. Therefore, while management should exhaust every means in endeavoring to settle all problems of employer-employee relations that may arise, it cannot agree to submit to arbitration (which is a surrender by both sides to the authority of an outside agency) any point at issue where compromise might injure the long-term interests of the business and therefore, in turn, damage the mass of employees themselves.

"This does not in any way mean that impartial or judicial agencies have no place in collective bargaining. On the contrary, controversial questions of fact, such as discrimination cases and questions of layoff, may frequently be more amicably and speedily settled through an impartial, competent, fact-finding agency having the confidence of both sides."<sup>15</sup>

The impact of World War II on labor arbitration has already been discussed. Many umpireships, like the one between Chrysler and the UAW, are part of this history.<sup>16</sup> The Chrysler umpire,

<sup>12</sup> Alexander, *Impartial Umpireships: The General Motors-UAW Experience*, in NATIONAL ACADEMY OF ARBITRATORS, *ARBITRATION AND THE LAW*, PROCEEDINGS OF THE 12TH ANNUAL MEETING 108, 110 (McKelvey ed. 1959).

<sup>13</sup> *Id.* at 111.

<sup>14</sup> *Id.* at 112-16.

<sup>15</sup> *Id.* at 116.

<sup>16</sup> Wolff, Crane & Cole, *The Chrysler-UAW Umpire System*, in NATIONAL ACADEMY OF ARBITRATORS, *THE ARBITRATOR AND THE PARTIES*, PROCEEDINGS OF THE 11TH ANNUAL MEETING 111, 113 (McKelvey ed. 1958).

incidentally, became the impartial chairman of a pre-existing board of appeals which consisted of two representatives of the corporation and two representatives of the union.

## II. THE KINDS OF CASES BEFORE LABOR ARBITRATORS

The kinds of cases which come before a tribunal often go a long way toward explaining the tribunal. Professor Fuller has pointed out, for instance, that arbitrators are often asked to resolve issues which the courts might have labelled non-justiciable.<sup>17</sup>

There are doubtless many ways in which one could classify the cases coming before labor arbitrators. For present purposes, any classification system which offers some insight into the wide variety of cases will do. One might, therefore, divide the cases into four groups: (1) contract interpretation cases, (2) "legislation" cases, (3) "policy" cases, and (4) "interest" cases. These categories overlap, and further refinement is necessary in order to indicate what is meant in each instance.

### A. *Contract Interpretation Cases*

By far the largest single category of cases which come before labor arbitrators involves what might be described as straight contract interpretation cases. Was *A* discharged for just cause when he allegedly violated the rules by smoking in a dangerous area? Does *B*, who is the senior man, have the ability to perform a certain job in which his seniority will prevail if he has the necessary qualifications? Should *C*, *D*, and *E* be paid for non-working time during a power failure not attributable to the company? Did the company wrongfully deny certain work to *F*, *G*, and *H* when they customarily performed such work? Did *J* have to take another physical examination when he returned from sick leave? Must *K* work both the day before and the day after a holiday in order to qualify for holiday pay? Did *L*, who quit his job after the vacation period began, qualify for vacation pay? These questions are the grist of the labor arbitration mill. In quantity they go to make up the great bulk of the cases which are presented. This is not to say that the answers are easy in such cases; indeed, it may be very hard to find satisfactory or convincing answers. But at least there is, by hypothesis, contract language bearing on the point. The difficulty is likely to be one of proof (*e.g.*, in the discharge

<sup>17</sup> Fuller, *Collective Bargaining and the Arbitrator*, in NATIONAL ACADEMY OF ARBITRATORS, COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE, PROCEEDINGS OF THE 15TH ANNUAL MEETING 8, 37 (Kahn ed. 1962).

and promotion cases), or of determining what the parties meant by certain contract language (as in the power failure and holiday pay cases). With respect to the latter category, it may be that the parties never thought of the problem and therefore had no intended meaning. In that case the problem falls more nearly into what is here classified as the "legislation" category. Often, however, the parties will argue vigorously that they did anticipate the problem at hand and that the language, which may seem subject to more than one interpretation, was understood by both parties to have a definite meaning.

#### B. "*Legislation*" Cases

Every arbitrator sooner or later finds himself faced with the case in which the parties quite obviously failed to anticipate the situation which has arisen. Nevertheless, the arbitrator is asked to resolve the dispute by applying language which was written for another purpose. These cases are best illustrated by example.

In a transit case the company and the union had signed a three-year contract. During negotiations a difficult issue had been the application of a cost-of-living formula. Under the old contract there was a one-cent adjustment in the wage rate for every one-point change in the index. The union argued, and the company agreed, that this formula was inequitable since a one-cent change in the wage rate did not necessarily equal a one-point change in the index on a percentage basis. The new contract provided that there should be a percentage adjustment in wages, and that this would be calculated quarterly. The new contract also called for several deferred increases over the period of the contract. Everything went along smoothly for about two years. Then some of the employees received checks containing less than they calculated was due them under the deferred increase and cost-of-living formulas. On checking with the company, it was discovered that the company and the union had been proceeding on different theories which, up to then, had not resulted in any difference in wages. The company understood that cost-of-living adjustments were to be made on the base wage which existed at the time the contract was signed. The union understood that cost-of-living adjustments would be made on the current base rate which would include any deferred increases. The contract simply provided that cost-of-living adjustments would be made on the "base rate." Since this provision could be read to support either position, a grievance was filed. Ultimately, the issue came to arbitration. At the hearing the

union argued that it was sure that in negotiations it had mentioned cost-of-living adjustments based on currently existing rates, but it admitted that this point had not been discussed at any length. The company frankly stated that its representatives had no recollection of any discussions on the subject, but that if the subject had been discussed the company was sure that its past position would not have differed from the one now espoused. From the arbitrator's standpoint it appeared to be a case in which the parties had simply not anticipated the problem. Arriving at a decision by interpreting the contract language would involve a conclusion as to what the parties would have thought about the problem had they thought about it. Courts frequently face this dilemma in connection with the interpretation of legislation.<sup>18</sup> However, this analogy only serves to illustrate that the arbitrator, in arriving at such a decision, would operate as a legislator rather than an adjudicator.

In another case the contract provided that as to Saturday work the first four hours would be compensated at time-and-one-half, and the second four hours would call for double-time. The plant operated on two shifts, but never in history had the second shift worked on Saturday. Suddenly an emergency arose which required that the second shift work on Saturdays for a two-month period. What should the compensation be? Frankly admitting that the contract did not contemplate the problem, the company nevertheless argued that the "spirit" of the contract was that the first four hours for anyone working on Saturday would be paid at time-and-one-half, and the second four hours at double-time. The union argued that since the contract actually read that time-and-one-half would be paid until noon, and double-time in the afternoon, all hours after noon must be regarded as double-time hours. At the same time the union conceded that the problem had not been anticipated when the contract was written. An arbitrator could reach a decision by applying the contract language, but he could hardly pretend that in doing so he was simply carrying out the original wishes of the parties, for they had no such prior informed intent. It may be, as the company argued, that the "spirit" of the contract was that any Saturday work should be compensated according to the contractual pattern. This conclusion could, in

<sup>18</sup> Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), in which the Supreme Court was asked to rule on the question of whether the hiring of a clergyman by a New York church violated the prohibition of the Alien Labor Act against contracting with an alien for "labor or service of any kind."



fact, be documented by showing an "area practice" involving this particular union and other employers. But one could hardly say that this was what the parties meant, when clearly they had never thought of the problem. A result which would favor the union might be reached by extending the literal language of the contract so that any hours beyond noon on Saturday called for double-time. But this outcome, too, would hardly qualify as an instance of straight contract interpretation, for the result would fly in the face of the admission of the parties that they never intended the language to cover the situation at hand. The upshot was that any decision which the arbitrator announced would be, in a very real sense, either his estimate of what the parties would have done had they thought about the problem, or his estimate of what was the "best" interpretation of the contract under the circumstances. In either case the arbitrator would exercise "the sovereign prerogative of choice."

A third, and final, illustration involves a not infrequent seniority case. A small company found itself faced with the necessity for quick expansion during the Korean conflict. Production workers could be readily hired, but the acquisition of supervisory talent offered more serious obstacles. The result was that a long-time production worker was promoted to a supervisory position in which he worked for two years. When the Korean conflict ended, the company returned to its peacetime labor force and cut back both in its supervisory and production ranks. The employee in question was bumped from supervision into production. A question then arose as to his seniority rights. The contract contained the usual provisions on termination of seniority, triggered by events such as leaving the company, or by lay-off for more than two years. Pressed by other members who were about to lose their jobs on lay-off, the union argued that the promoted employee had lost all his seniority when he chose to enter the supervisory ranks. The company argued that as a minimum he retained what he had when he became a supervisor. Both sides conceded that the problem was a new one to them, and that in writing the contract they had not thought of it. An arbitrator could, of course, reach a decision in such a case. But in doing so he could hardly say that he was simply applying the contract because both sides freely admitted that the contract was not written in contemplation of the problem. Whatever the rationale, therefore, the resolution of the matter would more nearly represent legislation than contract interpretation.

### C. "Policy" Cases

The "policy" case, as defined herein, refers to the situation in which the arbitrator is asked to apply some vaguely defined industrial relations value without reference to the contract language. Such cases often arise out of strike situations and form a part of the settlement agreement which terminates the work stoppage. Examples will again best serve to illustrate the point.

A brewery found itself faced with the necessity for transferring three employees from the garage to the trucking division. Before the move was announced, a rumor, which greatly exaggerated the situation, swept through the plant. The result was a work stoppage in violation of the contract. The matter was finally settled by an agreement to refer to arbitration two items: (1) whether the company violated the contract by the proposed change in the method of operation, and (2), if so, whether the company had a "moral" obligation to pay the employees for those hours during which the work stoppage took place. By agreeing to submit the second question, the company must have realized that it was giving the arbitrator much more room to maneuver than if it had insisted upon a simple decision as to whether, under the terms of the contract, the men were entitled to be paid. There was no doubt that the stoppage was in violation of the contract, and as a straight contract issue it would have been extremely difficult for the arbitrator to justify pay for men who were in violation of their own promise. By placing the issue on "moral" grounds, however, the union had room, which it utilized, to argue that the procedures which the company used in preparing for the change were such as to provoke the stoppage, and that the company was therefore morally bound to pay for the lost time.

In the first paragraph of his decision the arbitrator clearly set forth the dimensions of the problem which faced him. He said:

"We are here concerned with the moral and not the legal obligations of the parties. These involve questions of the 'right and wrong' and the 'ought and ought not' of labor-management relationships, the answers to which are enforced by a command of conscience rather than by the sanctions of law. These relationships are constantly changing and the tests and standards applied to them are uncertain. In part, this stems from the fact that a great many aspects of the relationships are functional in character and there are substantial differences about how to fulfill them properly and effectively. In part, it also stems from the fact that the idea of 'right and

wrong' in labor-management relationships is modified by changes in the concept of right and wrong in society at large. As a result, there are no universally accepted commandments in this area."<sup>19</sup>

The long and bitter Wilson and Company strike in the fall of 1959 led to a somewhat similar arbitration. Settlement came after the men had been out for three and one-half months and the company had hired a substantial number of replacements. This meant that on the termination of the strike there would be many fewer jobs than the combined total of the newly hired and the older employees. Such a situation invariably renders a strike much more difficult to settle. A solution which was acceptable to both sides was arbitration. Since the contract had long since expired, there could be no contractual issue. The company was reluctant to take back any strikers who were alleged to have participated in unlawful or unprotected activity. On the other hand, the union was reluctant to see the rights of the strikers determined by what it considered to be "narrow legal principles." The result was that the board of arbitration was asked "to decide, in the light of all the equities and all facts and considerations deemed by the Board to be relevant, the fair and proper disposition of all issues in respect to all employees affected . . . ."<sup>20</sup>

By giving the board of arbitration power to deal with the "equities," and to make "fair and proper disposition" of the issues, the parties were in effect throwing themselves on the mercy of the board without giving the board much of a standard by which to decide. It would be naive to suppose that the parties did not know this. The standards were deliberately vague because only in this fashion could a mutually agreeable stipulation be reached.

#### D. *"Interest" Cases*

The "interest" cases, as that term is here used, are those cases in which the parties have chosen to submit to arbitration the determination of the terms of a new contract. There is relatively little of this kind of arbitration in the United States, and what there is deals primarily with the question of wages.<sup>21</sup> Both labor and management tend to oppose interest arbitration, though it

<sup>19</sup> From an unpublished opinion furnished to the writer in confidence.

<sup>20</sup> Wilson & Co., 34 Lab. Arb. 125, 126 (1960).

<sup>21</sup> BERNSTEIN, *ARBITRATION OF WAGES* (1954).

has been suggested that their fears are unwarranted.<sup>22</sup> The successful use of interest arbitration to resolve remaining issues in the difficult Chicago and Northwestern and Southern Pacific railroad cases during the past year may somewhat change its image. In both cases, however, prolonged negotiations settled most of the issues prior to arbitration, and it was only after a serious strike that arbitration was agreed upon in the Chicago and Northwestern case.

Costly and disruptive strikes involving railroads, airlines, shipping, missiles, and newspapers have recently increased interest in *compulsory* arbitration as a device for settling interest disputes. This is not the place for an extended analysis of compulsory arbitration. It is important in the present context, however, to recognize that compulsory arbitration is different both in kind and in degree from voluntary arbitration. It is different in kind because consent implies acceptance of generally recognized standards which will determine the outcome of the case. It is this acquiescence in known standards which makes the dispute amenable to a decision by a third party. Wages, for instance, are commonly set by comparison with the cost of living, productivity, area and industry standards, and inequities. When the parties agree to submit a wage issue to arbitration, they know that the outcome will be determined by the effectiveness of their arguments in relation to these or other accepted criteria. By contrast, an unwillingness to submit a wage issue to arbitration is likely to mean that one or both parties reject a conclusion based on such standards. One may be seeking a breakthrough, and the other a breakaway. This fact changes the whole character of the proceeding. In such a case experience suggests that an unacceptable decision, which may very well mean a decision based on the usual criteria, will be rejected despite sanctions provided in the law.<sup>23</sup> This inevitably pushes the arbitrator in the direction of mediation rather than arbitration.

Compulsory arbitration catches the parties in the bargaining stage, and collective bargaining is legislative rather than judicial in character. Either side may demand that the other bargain over wages, hours, and other terms and conditions of employment, and the parties may go even further and bargain about other legal

<sup>22</sup> Handsaker, *Arbitration and Contract Disputes*, in NATIONAL ACADEMY OF ARBITRATORS, CHALLENGES TO ARBITRATION, PROCEEDINGS OF THE 13TH ANNUAL MEETING 78, 92 (McKelvey ed. 1960).

<sup>23</sup> Kennedy, *The Handling of Emergency Disputes*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF SECOND ANNUAL MEETING 24 (1949).

issues which do not fall within the above categories.<sup>24</sup> The problem is much like that of political parties before the legislature. Each party has a program which it hopes to get adopted. Each knows that it will not be wholly successful. Indeed, the only question is how much of what one wants one can get. Progress is achieved through compromise, elimination, and trading. To suggest that one apply compulsory arbitration at the end of a legislative session to those items as to which the parties remain in disagreement would be unthinkable. Yet, the legislative process is much like collective bargaining. The difference comes at the next step. If the legislature is unable to agree, the *status quo* will not be disturbed. If labor and management cannot agree, a strike or lockout will ensue. This difference doubtless justifies dissimilar treatment. Unfortunately, it does not change the fact that the underlying problem is legislative in character and therefore not readily amenable to adjudicatory techniques. An example will illustrate the point.

One of the major disputes of the past year involved the Atlantic and Gulf Coast maritime industry and the longshoremen. Following a strike, the President appointed an emergency board under the Taft-Hartley Act. The board reported that there had been a complete failure in collective bargaining.<sup>25</sup> The union had submitted a long list of demands which included wages, length of the working day, improvement of pensions, major medical coverage, increase in penalty cargo rates, vacation contributions and entitlements, eligibility for holidays, and severance pay at terminated operations. The employers responded with an even longer list which included, among other things, night shift differentials, flexibility of meal hours, elimination of travel time within the Port of New York, guarantees to men working after noon, obligation of the union to provide labor for overtime work, discipline for unexcused absenteeism, right of the employer to cancel work under adverse weather conditions, royalties on bulk sugar and containers, and clarification of the employers' rights in using the work force. These demands and counter-demands remained substantially the same right up to the time of the final settlement before the board chaired by Senator Morse. If that board had failed, compulsory arbitration might well have been required by Congress. What issues would then be before the

<sup>24</sup> Fleming, *The Obligation To Bargain in Good Faith*, 47 VA. L. REV. 988 (1961).

<sup>25</sup> N.Y. Times, Oct. 5, 1962, p. 1, col. 2.

arbitrators? Presumably all of the demands which remained unsettled, plus the scores of local issues which had not even been touched. But such an arbitration would be both interminable and unmanageable. Inevitably the arbitrators would be required to mediate until they had reduced the dispute to manageable proportions. Even at that late stage, the arbitrators might be inclined to mediate because the dispute would be one which, by definition, would not lend itself to solution by application of known and accepted criteria.

It was said earlier that compulsory and voluntary arbitration are different not only in kind but in degree. Much of what has been said up to this point illustrates the difference in kind. There is also a very great difference in degree. When an arbitrator decides a seniority question under a contract, he is dealing with the security of one or more individuals. By contrast, practically every major dispute in the past year has involved the security of a great many employees against unemployment—particularly against the advance of machines. Where are the guidelines for an arbitrator in such a case? Granted that technological change is essential, what is the obligation of the business to the displaced employee? Is he entitled to follow his job to another location? What about his pension rights? Is he entitled to severance pay and/or re-education benefits? Must the employer reduce his work complement only by attrition so that individual employees will not be hurt? The answer to these questions can be tremendously costly to the employer and devastating to the employee. It will be hard for any outsider to know the exact impact of a proposed decision. This will once again exert pressure on the arbitrators to mediate. Quite apart from the question of acceptability, they will worry about feasibility. Feasibility is not an unknown concern to the grievance arbitrator, but its order of importance is normally far less than in the case of issues subject to compulsory arbitration.

Finally, there is the problem of enforcing an award imposed against the will of the parties. Distasteful as the thought may be, there is a serious problem in this area, and it has no real parallel in the voluntary proceeding. Wise heads have counselled that one must never disclose the impotency of a democracy. President de Gaulle, surely as strong a democratic leader as the world can offer, encountered the problem recently when the French coal miners struck against the government. Despite legislation which enabled him to impose his will on the miners, the French leader was unsuccessful in ending the strike until an agreed settlement was

made.<sup>26</sup> The Australian experience with compulsory awards further documents the difficulty of enforcing an unpopular decision.<sup>27</sup> In such cases continued negotiations, rather than application of legal sanctions, are likely to be required if success is to be achieved.

There are, then, substantial differences between compulsory and voluntary arbitration. The latter is much more amenable to adjudicatory procedures than is the former. In part this is because the stakes are higher when interests rather than rights are involved. But if this were all that mattered one might nevertheless see a perceptible movement toward voluntary interest arbitration. The more important distinction between compulsory and voluntary arbitration is that inability to agree on arbitration when interests are involved implies inability to accept recognized criteria for settlement. When this is true, normal arbitral techniques must be applied with caution. The institutional pressures which surround such situations will inevitably move a compulsory board of arbitration in the direction of mediation.

The fact that there are difficulties in the way of compulsory arbitration does not mean that we will not, or even should not, require it in some cases. The record of collective bargaining is so dismal in some industries that it has little to recommend it. One of the most vulnerable is the maritime industry, where legislation is now pending to require arbitration.<sup>28</sup> For purposes of the present article, it is enough to note that compulsory and voluntary arbitration involve quite different procedures and that the great success of voluntary arbitration means little in terms of whether compulsory arbitration can ever succeed.

### III. COURTS AND ARBITRATION TRIBUNALS

There are, as was suggested earlier, some pointed differences between courts and labor arbitration tribunals. There is also a long-standing dispute among arbitrators as to whether labor arbitration is an extension of collective bargaining or a judicial-type proceeding.<sup>29</sup> In essence, this is a dispute over whether arbitrators

<sup>26</sup> *Id.*, April 4, 1963, p. 1, col. 1.

<sup>27</sup> PERLMAN, JUDGES IN INDUSTRY 181-82 (1954).

<sup>28</sup> H.R. 1897, 88th Cong., 1st Sess. (1963).

<sup>29</sup> Cf. Davey, *The John Deere-UAW Permanent Arbitration System*, in NATIONAL ACADEMY OF ARBITRATORS, CRITICAL ISSUES IN LABOR ARBITRATION, PROCEEDINGS OF THE 10TH ANNUAL MEETING 161 (McKelvey ed. 1957); Moise, *The Judicial Theory of Arbitration*, in UNIONS, MANAGEMENT, AND THE PUBLIC 489 (Bakke & Kett ed. 1948); Taylor, *Effectuating the Labor Contract Through Arbitration*, in NATIONAL ACADEMY OF ARBITRATORS, THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS 1948-1954, at 20 (McKelvey ed. 1957).

should mediate.<sup>30</sup> One suspects that it is a debate which rests in large part on false assumptions. The notion that courts never mediate is an illusion. Particularly since the advent of the pre-trial conference, there have been an increased number of settlements.<sup>31</sup> The literature on court behavior in this respect suggests that there may be as much variation among courts<sup>32</sup> as between the GM-UAW and hosiery industry umpireships.<sup>33</sup>

A clearer perspective as to the differences between labor arbitration tribunals and courts may emerge if we now return to the five significant points of difference which were set forth at the outset.

### 1. *The "Private" Law of the Arbitration Tribunal*

A court of general jurisdiction handles both civil and criminal cases, and in either event the governing "law" does not emanate from the parties before the court. Much the same may be said for the special court, *e.g.*, a tax court, except that its jurisdiction will be more limited. The labor arbitration tribunal is faced with the rather unique fact that the parties have written the "law" over which the tribunal is given jurisdiction, and that, whatever the outcome of the case, it is the firm intention of the parties to continue living together. Not even the domestic relations court finds itself in that position.

Judges take an oath to uphold the law of the jurisdiction in which they are appointed. Arbitrators, if they take an oath at all, simply swear that they will make a just award according to the best of their understanding. This does not mean that arbitrators can act as if they were under a different sovereign, immune from local, state, and federal laws. Indeed, courts have from time to time held arbitration awards invalid on the ground that they were contrary to the law, or against public policy. This happened in the *Western Union* case,<sup>34</sup> where an arbitrator had awarded back pay to certain individuals who had been suspended for deliberately refusing to deliver certain cable messages originating in a strike-bound section of the company. The reviewing court said that such

<sup>30</sup> In this connection, see *Code of Ethics for Arbitrators*, in NATIONAL ACADEMY OF ARBITRATORS, *op. cit. supra* note 3, at 153.

<sup>31</sup> Sunderland, *Problems Connected with the Operation of a State Court System*, 1950 WIS. L. REV. 585, 594-99.

<sup>32</sup> *Id.* at 598-99.

<sup>33</sup> Cf. Alexander, *supra* note 12, at 142; KENNEDY, *EFFECTIVE LABOR ARBITRATION* 57 (1948).

<sup>34</sup> *Western Union Tel. Co. v. American Communications Ass'n*, 299 N.Y. 177, 86 N.E.2d 162 (1949).



a ruling was contrary to the law of the state, and was therefore invalid. Likewise, a California court set aside an arbitration award in which an arbitrator had reinstated a woman who was alleged to be a communist. In its decision the California Supreme Court seemed to say that reinstatement would be against the public policy of the state, though the United States Supreme Court later chose to give the decision a more restricted meaning.<sup>35</sup> In another area, the National Labor Relations Board has always insisted that it has exclusive jurisdiction over discharges alleged to be for union activity, and that, while it may choose to recognize an arbitrator's award in such a case, this is purely in the discretion of the Board.<sup>36</sup> Nevertheless, within the broad limits of the law, the arbitrator is free to apply the purely private law of the parties to the collective bargaining contract without interference from the state. And in doing so he will not only face the same litigants over and over again to the exclusion of all others, but those litigants will have written the "law" which he is expected to administer. No judge ever finds himself in quite this position.

Perhaps it will be said that the term "law" is much too broad to apply to the category of cases which will face the labor arbitration tribunal. In fact, if one leaves aside the limited number of "interest" cases, the tribunal will simply interpret a contract, and contract law is, after all, a very limited phase of the entire body of law. But this begs the question, for it ignores the nature of the labor-management contract. American courts have long been troubled by the fact that the labor contract does not look quite like other contracts, and the English courts have simply treated them as unenforceable. In the classic *J. I. Case* decision, Mr. Justice Jackson said of the collective bargaining agreement:

"Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship wherever and with whomever it may be established."<sup>37</sup>

The present Solicitor General, Archibald Cox, once detailed

<sup>35</sup> *Black v. Cutter Lab.*, 43 Cal. 2d 788, 278 P.2d 905, *cert. granted*, 350 U.S. 816 (1955), *cert. dismissed*, 351 U.S. 292 (1956).

<sup>36</sup> *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1098 (1961). See also *NLRB v. Disney Prods.*, 146 F.2d 44 (9th Cir.), *cert. denied*, 324 U.S. 877 (1945).

<sup>37</sup> *J. I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

four significant ways in which the labor contract differed from other contracts: (1) in the number of persons affected, and the complexity of their interrelationships ("If we think of the union as an agent and the employees as principals, we have the paradox that the agent is the principals acting as an organization"<sup>38</sup>); (2) in the range of conduct and variety of problems covered; (3) by operating prospectively over a substantial period; and (4) in the fact that the parties share a degree of mutual interdependence which is seldom associated with simple contracts.<sup>39</sup>

Dean Shulman summed it up this way:

"To be sure, the parties are seeking to bind one another and to define 'rights' and 'obligations' for the future. But it is also true that, with respect to nonwage matters particularly, the parties are dealing with hypothetical situations that may or may not arise. Both sides are interested in the welfare of the enterprise. Neither would unashamedly seek contractual commitments that would destroy the other. Each has conflicts of interests in its own ranks. Both might be content to leave the future to discretion, if they had full confidence in that discretion and in its full acceptance when exercised. And even when the negotiating representatives have full confidence in each other as individuals, they recognize that it will be many others, not they, who will play major roles in the administration of the agreement. So they seek to provide a rule of law which will eliminate or reduce the areas of discretion. The agreement then becomes a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith."<sup>40</sup>

There is perhaps one other comment which remains to be made about the private "law" which the arbitration tribunal administers. Private though it is, and different though it may be from typical contract law, it is not *wholly* different, and this is of considerable importance. Many questions of contract interpretation before arbitration tribunals *do* look like typical con-

<sup>38</sup> Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in NATIONAL ACADEMY OF ARBITRATORS, *ARBITRATION AND THE LAW*, PROCEEDINGS OF THE 12TH ANNUAL MEETING 34 (McKelvey ed. 1959).

<sup>39</sup> *Id.* at 33-37.

<sup>40</sup> Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005 (1955).

tract interpretation cases which come before courts—does the contract require that an employee work both the day before and the day after a holiday in order to qualify for holiday pay;<sup>41</sup> did the contract permit the purchaser to recover his deposit on a purchase of realty if he did not sell certain lots within sixty days?<sup>42</sup> Many of the cases in which arbitration tribunals are asked, in effect, to legislate *do* look like cases in which courts are called upon to interpret statutes—did X retain his seniority when promoted from the production ranks to a supervisory position;<sup>43</sup> does the Motor Vehicle Theft Act apply to airplanes as well as automobiles?<sup>44</sup> Some of the policy cases which come before arbitration tribunals *do* look like similar issues before courts—does the company have a moral obligation to pay employees during a work stoppage;<sup>45</sup> is the Connecticut birth control law an infringement of the rights guaranteed by the fourteenth amendment?<sup>46</sup> Because this is so, arbitrators draw heavily on the experience of courts, and upon concepts developed by the courts. An excellent illustration, which could be repeated *ad infinitum*, is the rather consistent ruling of arbitrators that lie detector evidence is inadmissible in an arbitration proceeding *because the courts, in similar circumstances, have not thought it reliable*.<sup>47</sup>

In summary, it is evident that the labor arbitration tribunal is unique, in that it has only one set of party litigants and that these litigants have themselves drafted the laws which are being interpreted. On the other hand, the tribunal is not immune from the sovereignty of the state, and there is sufficient comparability between its work and that of the courts so that arbitrators rely heavily on concepts developed by the courts. Overall, the principles which guide courts and arbitration tribunals are doubtless more alike than different. Nevertheless, the differences are of such a critical nature that they must be kept in mind.

## 2. *The Arbitrator Is the Choice of the Parties*

In either the *ad hoc* or permanent umpire situation the arbitrator is the mutual choice of the parties. Doubtless in any given instance one could measure varying degrees of enthusiasm with

<sup>41</sup> See Greif Bros. Cooperage Corp., 34 Lab. Arb. 283 (1960); American Chain & Cable Co., 21 Lab. Arb. 15 (1953).

<sup>42</sup> Woods v. De Marigny, 59 So. 2d 167 (La. Ct. App. 1952).

<sup>43</sup> Aermotor Co., 30 Lab. Arb. 663 (1958).

<sup>44</sup> McBoyle v. United States, 283 U.S. 25 (1931).

<sup>45</sup> See text at note 19 *supra*.

<sup>46</sup> Poe v. Ullman, 367 U.S. 497 (1961).

<sup>47</sup> Brass-Craft Mfg. Co., 36 Lab. Arb. 1177 (1961).

which the parties make the choice, but the fact remains that in the kind of situation we are discussing no one imposes an arbitrator on the parties. A judge, on the other hand, is either appointed or elected through procedures not controlled by particular litigants. The parties who will appear before a judge will at most have had only a rather remote connection with his selection. This does not mean that disputing parties to a legal case will have no choice whatsoever as to the forum in which they appear. Rather wide choices may be available as between going into a federal or a state court, into one federal court rather than another, into one state court rather than another, or before one judge rather than another within a given geographical jurisdiction. There is no doubt that lawyers are conscious of the possibilities inherent in this situation and that they try to take advantage of it.<sup>48</sup> Much the same thing can be said of the possibilities for a change of venue taken for the purpose of bringing the matter before another court.<sup>49</sup> But in each of these situations the choice will be between judges already in office, and the parties will never have an opportunity directly to name their own judge.

But perhaps when we contrast the selection of judges and labor arbitrators we are trying to compare two not very comparable situations. *Ad hoc* arbitration probably constitutes the great volume of this kind of business, and it is normally associated with parties who do not have sufficient business to warrant retaining a permanent umpire. The feasible alternative for them—and perhaps even for the relationship which does warrant a permanent umpire—would be a staff of government arbitrators who would be available on call. New York and Wisconsin have long provided such a service. At one time, immediately after World War II, the Federal Mediation and Conciliation Service did likewise. Perhaps the best example of all is found in the railroad industry, where adjustment boards have been provided for years at public expense. In this connection, it is of interest that a recent report made under the auspices of the Committee for Economic Development suggested that the railroad adjustment board procedure be abandoned in favor of the kind of private arbitration found in the balance of industry.<sup>50</sup> The New York and Wisconsin procedures continue to render valuable service to small companies and

<sup>48</sup> Cf. Daily Labor Report No. 218, Nov. 7, 1962 p. A-1, in which the race between the Darlington Mfg. Co. and the Textile Workers Union of America to obtain review of the NLRB's order before the 4th Circuit versus the D.C. Circuit is reported.

<sup>49</sup> Cf. ILL. REV. STAT. ch. 146, § 1 (1961).

<sup>50</sup> COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 105 (1961).

unions in those states. However, the Federal Mediation and Conciliation Service found that continuation of its arbitration service was incompatible with its principal function of mediation and conciliation, and therefore abandoned it.<sup>51</sup>

Another possible alternative would be to turn in the direction which most of the Western European countries have taken, and to establish labor courts.<sup>52</sup> It can be argued that this would offer certain advantages, but little serious attention has been given the subject of utilizing the courts except as a possible alternative to the general jurisdiction of the National Labor Relations Board over unfair labor practices.<sup>53</sup>

Both of the principal appointing agencies, the American Arbitration Association and the Federal Mediation and Conciliation Service, will, on request, appoint arbitrators in given situations, but this is not frequently done and the agencies have shown little enthusiasm for such a role.<sup>54</sup>

The inescapable conclusion on methods of selecting labor arbitrators is that there is no very feasible alternative short of a system of labor courts, or government appointment. Both of these alternatives have been tried, either here or abroad. But, outside the railroad industry, there appears to be little disposition, in this country, to turn in such a direction.

### 3. *The Arbitrator Is Without Effective Tenure*

Whether judges should be appointed or elected has provided matter for argument since the early nineteenth century. Some believe that only by appointment, subject to good behavior, can the judge be protected from the pressures around him which will inevitably influence his decisions.<sup>55</sup> When we compare judges and arbitrators in this respect, the significant point is that, whether appointed or elected, a judge has more tenure than the labor arbitrator. In the typical *ad hoc* case the arbitrator has no tenure. Even in the umpireship he is under a contract which, if they so desire, the parties may terminate by purchase, though it still has some time to run.

<sup>51</sup> 1948 FED. MEDIATION AND CONCILIATION SERV. ANN. REP. 22.

<sup>52</sup> McPherson, *Labor Courts in Western Europe*, Ill. Bus. Rev., Nov. 1961, p. 6.

<sup>53</sup> Cf. 1961 PROCEEDINGS OF THE AMERICAN BAR ASS'N SECTION OF LABOR RELATIONS LAW 33.

<sup>54</sup> Braden, *Policy and Practice of the American Arbitration Association*, in NATIONAL ACADEMY OF ARBITRATORS, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, PROCEEDINGS OF THE 9TH ANNUAL MEETING 85 (McKelvey ed. 1956).

<sup>55</sup> See Schrader, *Judicial Selection: Taking the Courts Out of Politics*, 46 A.B.A.J. 1115 (1960).

It may be that tenure is not a significant concept when applied to the labor arbitrator. Dean Shulman once said:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for the community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not."<sup>56</sup>

Even if one disagrees with Dean Shulman as to the character of the arbitrator, it is apparent that the tenure problem which one associates with the courts does not fit the arbitrator. In the *ad hoc* case, tenure is, by definition, impossible. Moreover, by far the greatest number of men who engage in arbitration as neutrals do not rely on it for their livelihoods. Many of them are college professors, practicing lawyers, or consultants. Their economic security is not threatened by failure of the parties to invite them to serve in future cases.

Insofar as there is a tenure problem in labor arbitration, it is probably pretty well confined to the permanent umpireships. Economic security for such individuals is doubtless important, but hardly overriding, since they are invariably men of such stature in the field that they can quite readily shift from one set of clients to another. The influence of a lack of tenure, if there is one, is probably much more subtle. May want of tenure tend to stifle the kind of inventiveness which has characterized the great judges? Dean Rundell once told the following delightful story about a court faced with a hard decision:

"In a case which came before a Supreme Court a brother was claiming the estate of his father against his sister on grounds that seemed incontrovertible. The Chief Justice said to one of his juniors, 'We cannot let that rascal rob his sister. It is up to you to find a way to enable us to prevent it being done.' The junior, later telling the story, said that after much fruitless search he finally sufficiently recalled from his student days an obscure and rarely applied principle to enable him to trace it to its long forgotten source, a source sufficiently

<sup>56</sup> Shulman, *supra* note 40, at 1016.

authoritative to warrant its application to the immediate case which was done to the frustration of the grasping brother and the satisfaction of the court. So frank a confession of a search for legal reasons to justify a decision based on reasons that could not be avowed is not often found, but it is but an exaggeration of what must sometimes if not often take place."<sup>57</sup>

A number of permanent umpires have commented on the "strict construction" canon which they feel must govern the umpire. In explaining the John Deere-UAW system, Umpire Harold Davey said of incentive grievances:

"Not infrequently, cases have arisen where in my judgment equitable considerations dictated payment of average earnings, but where contractually one or more of the requisite conditions had not been satisfied. Such decisions are difficult to make and even more difficult to accept. However, in terms of the judicial theory of arbitration, the contract itself must always be the touchstone. If contract requirements and equity do not appear to coincide, the contract governs."<sup>58</sup>

In the same vein, Gabriel Alexander said of his philosophy while umpire under the GM-UAW contract:

"When the parties come to the umpire they encounter a pretty rigid kind of realism: that is, what does the agreement say?, and if the answer therein is clear there is no escape from it. Such an answer may not be so good for one side or the other or both. But if the agreement compels it, the umpire does not change it upon considerations of policy, expediency or philosophy."<sup>59</sup>

Both of these umpires claimed to follow a "judicial" approach to arbitration. This explanation contrasts nicely with Professor Fuller's assertion that, if any generalization can be justified, it is that judges, rather than arbitrators, are the ones who are inclined to play fast and loose with contract language. One of several examples which he cites in support of this proposition is the following:

"A enters a contract with B to render a performance scheduled to begin July 1st. On May 15th, A repudiates his agreement and tells B he is not going to perform. B brings suit on May 16th. A alleges that the suit is premature; his promise was to begin performance on July 1st. Until that date arrives,

<sup>57</sup> Rundell, *The Judge as Legislator*, U. Kan. City L. Rev., Aug. 1958, pp. 1, 8.

<sup>58</sup> Davey, *supra* note 29, at 181.

<sup>59</sup> Alexander, *supra* note 12, at 144.

he cannot be guilty of a breach of contract for he has promised nothing before then. For more than a century British and American courts have generally allowed B to recover. Why, they ask, should B have to wait around for July 1st to arrive when A has already told him he is not going to perform? If a promise is needed, we can say that in committing himself to begin performance on July 1st, A impliedly promised not to repudiate his obligation meanwhile. This result has often been criticized by legal scholars as an unprincipled rewriting of the words of the contract. It has become, however, accepted law."<sup>60</sup>

For the reasons we have suggested, tenure is not of the same order of importance in maintaining independence on the part of the arbitrator as is the case with the judge. If insecurity of tenure plays some part in encouraging caution on the part of permanent umpires, this may very well be exactly what the parties wish. Under what is probably the oldest permanent industry-wide grievance machinery in the country, that involving the Anthracite Board of Conciliation, established in 1903, the umpire is admonished, for instance, to decide grievances "*which arise in relation to the industry agreement, using as literal an interpretation as possible.*"<sup>61</sup>

#### 4. *Inclusion of Partisan Members on the Arbitration Tribunal*

Both in the United States and abroad there is a long history of lay judges who sit as members of the court. Vermont still uses them, as does Sweden. The purpose of such a system is presumably to give the "law" judge the benefit of the advice of persons who may be more familiar with the every-day affairs of the people than is the judge. But even in this kind of case, lay judges are not partisan in the sense that they espouse the cause of one side or the other.

Many collective bargaining contracts call for arbitration by a tripartite board. In point of fact, such boards are frequently waived at the time of the hearing and the neutral member proceeds on his own. In other cases, the partisan members are officially recorded on the decision but they do not sit on the tribunal at the time of the hearing and they do not meet with the neutral arbitrator after the hearing is over. Often they present the case for the parties. If there is ever a meeting of the entire board, it

<sup>60</sup> Fuller, *supra* note 17, at 13.

<sup>61</sup> SLIGHTER, HEALY & LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 743 (1960). (Emphasis added.)



is more likely to be in the nature of an opportunity for the neutral arbitrator to test out his thinking than conducted with any thought of influencing the decision.

As a practical matter, the presence of partisan members on an arbitration tribunal achieves much the same end as the equity practice of submitting a master in chancery's report to the parties before it is returned to the court.<sup>62</sup> In both cases there is a desire to give the parties a chance to react before a final decision is made. The arbitration procedure might also be compared to the common practice of courts in announcing a decision and then asking counsel for one side to draw an appropriate order to be submitted to the other side and then to the court for approval.

In theory the partisan members of an arbitration board might out-vote the neutral. In this event the decision-making process loses its adjudicatory character and becomes one of bargaining. It is also possible for the partisan members to introduce new considerations into the deliberations of the board and thus subvert the hearing process. Both of these things can and do happen, though rarely. There is nothing necessarily insidious when such does happen. I remember a highly controversial discharge case, on which I sat, in which, after a thorough discussion in which it was agreed that an employee committed offenses worthy of discharge, the partisan board members then engaged in a searching analysis of whether it would be "better" for the welfare of both parties and the future operation of the plant to reinstate the offending employee. In the course of this deliberation there came under discussion many factors not entered in the record at the hearing, but within the mutual knowledge of the partisan members.

Partisan membership on arbitration boards would doubtless be more acceptable to theoreticians and academicians if the form were changed to reflect the substance. This would mean that the partisan members would simply be designated as advisers. Under the U.S. Steel-USWA umpire system this change has, in fact, been brought about, and the advisers are available to the umpire on a post-hearing basis. It is doubtful, however, that any widespread move in this direction will be made; there is little pressure for such a change of formula, and there is a considerable emotional attachment in both labor and management circles to the tripartite board. This pattern probably reflects the suspicion with which both sides have always viewed outside agencies which meddle in their affairs. It is noteworthy that even in the Western European

<sup>62</sup> 1 PUTERBAUGH, *CHANCERY PLEADING AND PRACTICE* § 216, at 326 (7th ed. 1930).

countries, which have gone the route of labor courts as distinguished from our private arbitration tribunals, the courts are usually tripartite in nature.<sup>63</sup>

##### 5. *The Emphasis on "Acceptability" in Arbitration Awards*

To say that arbitrators are preoccupied with the acceptability of their awards and that the courts are indifferent is greatly to distort both situations. Until recently, the Supreme Court had consistently refused to take jurisdiction over reapportionment cases because it saw little likelihood that it could come up with a solution which would be acceptable.<sup>64</sup> Federal judges in the South have been tormented with the problem of implementing Supreme Court decisions in the integration area without meeting mass resistance.<sup>65</sup> State judges, elected in constituencies having strong union organization strength, are undoubtedly troubled about the issuance of injunctions in labor disputes. On the other hand, arbitrators worry very little in the routine grievance case over whether the decision will be acceptable. Nevertheless, there are institutional reasons why arbitrators tend to be somewhat more concerned with acceptability as a criteria than are the courts. There may also be institutional reasons why acceptability is easier to achieve. Both of these propositions deserve examination.

Many of the present corps of neutral arbitrators are products of the World War II War Labor Board experience. They have literally grown up with arbitration. They started at a time when the emphasis was on getting the parties into agreement. They remember that grievance arbitration was often imposed upon the parties by War Labor Board decree and that its survival in a peacetime economy depended in large measure on acceptance by the parties. They know from intimate experience that arbitration is the substitute for the strike and the lockout, and that the parties can return to a show of strength at any time that the process of arbitration becomes unacceptable to them. Finally, they have had indelibly impressed upon their minds the fact that, unlike the situation in the typical court case, the parties must continue to live together after the decision. Added to all this may be a factor of survival for the arbitrator, for in the absence of any tenure his continuation is clearly dependent upon making decisions which are acceptable to the parties.

<sup>63</sup> McPherson, *supra* note 52.

<sup>64</sup> *E.g.*, in *Colegrove v. Green*, 328 U.S. 549 (1946), the Court dismissed a reapportionment case, saying that the question was "political." *Contra*, *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>65</sup> PELTASON, *FIFTY-EIGHT LONELY MEN* ch. 9 (1961).

There is another side to the "acceptability" coin. If arbitrators are more inclined to be concerned with the acceptability of their decisions than are courts, it may also be true that such an end is easier for them to achieve. Controversial though the labor-management relations area may be, arbitration is normally limited to interpretation of the contract *on which the parties have already agreed*. Furthermore, there exists substantial agreement upon certain values which undergird the arbitration structure. Such values may be stated in this way:

1. Union representation of employees in a free industrial society is inevitable.
2. Given the existence of unions, the most desirable of the available alternatives for resolving labor-management problems is collective bargaining.
3. An integral part of collective bargaining is the settlement of grievances, and a mechanism for doing so is advantageous to both sides.
4. A "rule of law" concept is applicable to contract administration, hence impartial arbitration is both logical and desirable as a final step in the grievance process.
5. Since "rights," rather than "interests," are at issue, the stakes are limited.

Labor and management may subscribe to these propositions with varying degrees of enthusiasm; however, if serious disagreement between the parties should develop, deletion of the arbitration clause is quite likely—in which case the problem of acceptability disappears. Thus, the arbitrator renders his decisions in the context of a situation in which the parties have hedged their chances of serious damage. The courts are not so fortunate.

If one could equate only those court and labor arbitration cases in which difficult and intricate on-going human relationships were involved, perhaps there would be little difference in the importance which judges and arbitrators would attach to the factor of acceptability of the decision. But the court normally does not have to worry about the continuing relationship between litigants. Even in divorce cases it is possible for the parties to pick up their separate lives and start over. Inevitably, therefore, the labor arbitrator does assign more importance to acceptability than does the judge. Whether this is good or bad is not the point. The mere fact that he does it points up a significant difference between the two forums.

There is one situation in which it may be argued that the importance of acceptability is carried too far. This concerns the so-

called "agreed" award.<sup>66</sup> In such a case the parties have actually reached a mutually acceptable decision which has been communicated to the arbitrator and the hearing is only for the record. This situation is not as unsavory as it may sound, though most arbitrators are frankly uneasy about it.<sup>67</sup> It probably occurs most frequently in "interest" cases involving the terms of a new contract. Often the economics of the industry are such that an unpopular decision must be enforced, and the only way to do it is through a third-party proceeding. This may not differ much from the situation in which the judge, in a divorce, custody, or mental health proceeding, accepts the advice of counsel as to the best solution, though this advice is not always known to the client. Nevertheless, the area is a sensitive one and subject to understandable criticism.

#### SUMMARY AND CONCLUSIONS

The use of arbitration as a tool for the settlement of labor disputes was initially largely confined to strike situations involving the terms of a new contract. It is therefore not surprising that the term "arbitration" was often used interchangeably with "conciliation" and "mediation." Moreover, this very fact offers some historical explanation for the presence on modern arbitration tribunals of partisan members, and perhaps for the fact that acceptability to the parties is the hallmark of a successful arbitration award.

The great growth and development of labor arbitration has come since World War II, principally as a third-party procedure for settling differences as to the meaning and interpretation of contracts. Because this kind of a proceeding looks more like a "judicial" type proceeding than it once did, and because the court is the inevitable model for an accepted type of judicial proceeding, there is a continuing effort to compare the two types of tribunals. It is suggested that there are at least five significant points of difference between courts and labor arbitration tribunals: (1) the arbitrator is a "private" judge who administers a "private" system of jurisprudence over which labor and management hold joint sovereignty; (2) the arbitrator, unlike the judge, is the choice of the parties to hear their dispute; (3) the arbitrator is without

<sup>66</sup> Wirtz, *Due Process of Arbitration*, in NATIONAL ACADEMY OF ARBITRATORS, *THE ARBITRATOR AND THE PARTIES, PROCEEDINGS OF THE 11TH ANNUAL MEETING 1* (McKelvey ed. 1958).

<sup>67</sup> Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235, 248 (1961).

effective tenure; (4) the arbitration board frequently includes partisan members; and (5) a greater emphasis is placed upon acceptability of an award by an arbitration tribunal than is the case with the decision of a court.

It is further suggested that some of these differences can be explained by the history of labor arbitration and the kinds of cases which are brought before such tribunals. Furthermore, some of the differences between courts and labor arbitration tribunals are minimized if one looks below the surface. Thus, the presence of partisan members on an arbitration tribunal may, in fact, simply mean that they are functioning as advisers to the neutral member, and that the procedure is not unlike the situation when the judge issues a tentative decision and asks for the comments of counsel for the respective parties before making the decision final.

Perhaps the most fundamental of the differences between courts and labor arbitration tribunals is in their different orientation toward the question of the acceptability of the award. This difference may be largely institutional. The arbitration tribunal is in the unique position of *always* dealing with the same parties litigant. Furthermore, those parties must continue living together after a decision is announced. A greater premium naturally attaches to their acceptance of an award which must govern their actions in the future. An interesting and coincidental effect which this may have is to make the arbitrator more cautious than the judge in exercising ingenuity in difficult situations. If this is so, and it is suggested here that it is, it means that, contrary to popular impression, the arbitrator is much less of an innovator than is the judge.

A comparison between courts and labor arbitration tribunals is valuable in increasing the understanding of both. But, in the final analysis, the success or failure of the arbitration tribunal will not lie in its identification with the adjudicatory processes of the courts, but in its fulfillment of certain basic tests. Those tests might be phrased as follows:

1. Does the process accord the parties a fair and impartial hearing in the due process sense?
2. Is it administratively efficient?
3. Is it serving a socially constructive purpose?
4. Is it sufficiently flexible to meet the challenges of the future?

On the record one can, with relatively minor exceptions, answer most of those questions in the affirmative.